

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.**

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Date: February 2, 1998

Case No. 97 INA 207

In the Matter of:

CENTRAL AVENUE ACE HOME CENTER,
Employer

on behalf of

GANESH ROY,
Alien.

Appearances: Harvey Shapiro, Esq., of New York, New York

Before: Huddleston, Lawson and Neusner
 Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of GANESH ROY (Alien) filed by CENTRAL AVENUE ACE HOME CENTER (Employer), pursuant to § 212(a)(14)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.¹

Statutory authority. An alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File (AF), and written arguments of the parties. 20 CFR § 656.27(c).

not sufficient U. S. workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. See 8 U.S.C. § 1182(a)(14)(A). An employer desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. Such requirements include the responsibility of the employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability at that time and place.²

STATEMENT OF THE CASE

Application. On March 17, 1995, the Employer applied for labor certification to enable the Alien, a national of India, to fill the job of "General Manager" in its retail hardware and paint business. AF 12-15. The Employer described the job as follows:

Oversees management of operations and staff; set schedules; implement business and sales plans; prepare bids for federal and state government contracts for paint and related hardware supplies.

AF 15. Employer offered a salary of \$25, 500 a year for this position.³ The educational requirement was a baccalaureate degree in accounting, business, economics or finance with two years of experience in the Job Offered or two years of experience in the Related Occupation of Accountant. The Other Special Requirements were the following: "Must have one year of experience (job offered or Related Occupation) preparing or assisting with preparation of federal and state contract bids for paints and related hardware supplies." After job was posted and advertised, no responses or referrals were made. AF 36-38

Notice of Findings. The Certifying Officer (CO) issued a Notice of Findings (NO) on May 3, 1996, advising the Employer that certification would be denied, subject to rebuttal. AF 39-41.

The CO explained that even though the Employer said it would accept two years of experience in the Related Occupation of Accountant, the job description did not indicate that the work of an accountant was materially related to the duties of a Retail Store Manager. The CO found Employer's choice of related experience to be inconsistent with 20 CFR § 656.21(b)(2), which requires the hiring criteria to be those ordinarily needed for the performance of the job in the United States as it described and defined by the DOT. The CO directed that the Employer

²Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

³The workday was forty hours a week from 9:00 AM to 6:00 PM, with no overtime.

either delete or amend this Related Occupation or prove its business necessity, as it was a restrictive requirement under this regulation.

Noting Employer's hiring requirement of a baccalaureate degree and two years of experience in the Job Offered, the CO said the Alien had no experience in this occupation before he was hired by the Employer. Consequently, the CO directed Employer to establish that its job requirements are the minimum necessary for the position offered and that it has not hired or could not hire workers with less training and experience to perform the job duties, and that training a U.S. worker is not now feasible. 20 CFR § 656.21(b)(2) and (b)(5).

Rebuttal. Employer's June 19, 1996, Rebuttal consisted of an argument by counsel, a statement by Employer's apparent owner, and pages taken from Department of Labor publications. AF 42-48. As Employer was willing to accept an Accountant to perform this job, the Employer argued that the Alexin was an Accountant when it hired him and that he was qualified by experience in that Related Occupation for this reason.

Final Determination. The CO's Final Determination denying certification was issued on July 10, 1996. AF 49-51. The CO noted that the Rebuttal argument rested on Employer's contention that it did not have to address the "training issue," because the Alien was qualified by his experience in the Related Occupation of "Accountant" before he was hired. Observing that the Employer had failed to demonstrate any correlation between the job Offered and the Related Occupation, the CO explained that

Although employer contends that both occupations require [an] understanding of accounts payable, accounts receivable, finances and personnel, there is nothing to indicate that these duties were part of the job offer. Employer should have listed these requirements in item #13 of the A form and in the ad had it been part of the job and then and only then would accounting ha[ve] been acceptable as a related occupation.

AF 50. Concluding that the Related Occupation of Accountant was not related to the job offered, the CO found that the Alien was not qualified for the position and that the Employer had failed to address the "training issue." Accordingly, certification was denied, as the Employer failed to demonstrate that its job requirements are the minimum necessary for the performance of the duties of the position, that it had hired workers with less training or experience for this job, or that the hiring of a worker with less training or experience was not feasible.

Appeal. On August 13, 1996, the Employer appealed from the denial of certification and requested that the matter be referred to BALCA. AF 57-58. The Employer submitted a brief in which it argued that the NO was defective in that the CO had failed to notify the Employer that it should list the common skills on which it relied in Item # 13 of the Application by way of justifying its reliance on Accounting as a Related Occupation. Employer contended that this asserted omission was a prejudicial error in that it deprived the Employer of the opportunity to

respond to the NOF, since it was unaware that it could prove its case in this manner before the CO reached the Final Determination.⁴

Discussion

20 CFR § 656.21(b)(5) requires the employer to prove that its hiring criteria represent the employer's actual minimum requirements for the position. The employer must also show that it has not hired workers with less training or experience for jobs similar to the job offered or that it is not feasible to hire workers with less training or experience than that required by the position at issue. It is well established that an when employer has hired an alien with lower qualifications than it is now requiring of U. S. candidates for the same job, it has violated 20 CFR § 656.21(b)(5) unless it demonstrates that it is not feasible to hire a U. S. worker without the training or experience it now demands. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992). Where an employee is not allowed to require greater qualifications of a U. S. worker than it demands of the alien the employer is prevented from treating the alien more favorably than it treats a similarly situated U. S. worker. **ERF Inc., d/b/a/ Bayside Motor Inn**, 89 INA 105 (Feb. 14, 1990).

The issue raised by Employer's appeal is whether or not the NO was sufficient to warn the Employer that its job description in Part #15 of the Application form did not reflect any duties that relate to the work of an Accountant. The CO said,

Employer indicates that the job opening is for a General Manager or two years experience in the related occupation of Accountant. It is noted that item #13 on the ETA750A form does not reflect any job duties which could be remotely related to the occupation of Accountant. Therefore, employer is requested to document the relevant of the related occupation (Accountant) to the Job offered.

After examining the Appellate File and the DOT, the panel concludes that the NOF discussion of the Related Occupation was sufficient to notify the Employer of the defect that the NOF required it to address. AF 39-40. In its Rebuttal the Employer addressed the differences between the position of General Manager (Manager, Retail Store) of a small establishment and the work of an accountant. While the Employer quoted at length from the DOL Occupational Outlook Handbook on the prospects for managerial advancement of an Accountant in various industries, the Employer failed to mention the related occupations that this DOL handbook described in the excerpt it supplied:

Related Occupations. Accountants and auditors design internal control systems and analyze financial data. Others for whom training in accounting is invaluable include

⁴The form of the Employer's presentation suggests that it is appropriate for the panel to point out that its finding in this case is consistent with the Board's decision in **Francis Kellogg**, 94 INA 465(Feb. 2, 1998)(*en banc*) which is issued this date.

appraisers, budget officers, loan officers, financial analysts, bank officers, actuaries, underwriters, tax collectors and revenue agents, FBI special agents, securities sales workers, and purchasing agents.

AF 42. The skills of these two occupations can be compared in deciding this issue. The position offered in the Employer's application was a "Manager Hardware Store":

185.167-046 MANAGER, RETAIL STORE (retail trade) alternate titles: store manager. Manages retail store engaged in selling specific line of merchandise, such as groceries, meat, liquor, apparel, jewelry, or furniture; related lines of merchandise, such as radios, televisions, or household appliances; or general line of merchandise, performing following duties personally or supervising employees performing duties: Plans and prepares work schedules and assigns employees to specific duties. Formulates pricing policies on merchandise according to requirements for profitability of store operations. Coordinates sales promotion activities and prepares, or directs workers preparing, merchandise displays and advertising copy. Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records, or preparing daily record of transactions for ACCOUNTANT (profess & kin.) 160.162-018, or performs work of subordinates, as needed. Orders merchandise or prepares requisitions to replenish merchandise on hand. Ensures compliance of employees with established security, sales, and record keeping procedures and practices. May answer customer's complaints or inquiries. May lock and secure store. May interview, hire, and train employees. May be designated according to specific line of merchandise sold, such as women's apparel or furniture; related lines of merchandise, such as camera and photographic supplies, or gifts, novelties, and souvenirs; type of business, such as mail order establishment or auto supply house; or general line of merchandise, such as sporting goods, drugs and sundries, or variety store. GOE: 11.11.05 STRENGTH: L GED: R4 M4 L4 SVP: 7 DLU: 81

The only work experience that the Employer's application would accept as a Related Occupation was that of an "Accountant":

160.162-018 ACCOUNTANT (profess. & kin.) Applies principles of accounting to analyze financial information and prepare financial reports: Compiles and analyzes financial information to prepare entries to accounts, such as general ledger accounts, documenting business transactions. Analyzes financial information detailing assets, liabilities, and capital, and prepares balance sheet, profit and loss statement, and other reports to summarize current and projected company financial position, using calculator or computer. Audits contracts, orders, and vouchers, and prepares reports to substantiate individual transactions prior to settlement. May establish, modify, document, and coordinate implementation of accounting and accounting control procedures. May devise and implement manual or computer-based system for general accounting. May direct and coordinate activities of other accountants and clerical workers performing accounting and bookkeeping tasks. GOE: 11.06.01 STRENGTH: S GED: R5 M5 L5 SVP: 8 DLU: 88

The Employer argued that, since both occupations relate to business, they must be related to each other. This inference, however, is contradicted by the above-quoted DOT job descriptions, which contemplate functions that are materially different. They intersect to the extent that the store manager "Supervises employees engaged in sales work, taking of inventories, reconciling cash with sales receipts, keeping operating records, or preparing daily record of transactions for ACCOUNTANT (profess & kin.) 160.162-018." This very narrow correlation does not begin to encompass the broad range of managerial functions that the store manager must be able to perform, and the experience and professional training of an Accountant appears irrelevant to the merchandising functions that are the main work of a Retail Store Manager.

For these reasons the panel finds that the NOF did, in fact, place the Employer on notice of its need to present persuasive evidence that two years of experience in the duties of an Accountant was sufficient to prepare a job applicant to manage a retail store without more experience in the day to day operation of such a business. While the CO's suggestion that a different form of statement in the Application might have obviated the defect thus presented, the fact remains that Employer's rebuttal addressed but failed to connect up the two occupations, the text of the DOT description demonstrates that they are distinct and materially unrelated to each other, and experience as an Accountant was not shown to equip a worker to perform the necessary merchandising functions.

Accordingly, we find the CO's denial of certification was based on sufficient evidence and should be affirmed, and the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel.

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.